STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH CASWELL,

Defendant-Appellant.

UNPUBLISHED
November 7, 1997

No. 187897
Gratiot Circuit Court
LC No. 94-002922-FY

Before: Neff, P.J., and Wahls and Taylor, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to consecutive terms of two years for the felony firearm, and seventeen to thirty-five years for the murder. He appeals as of right. We affirm.

Defendant first claims that the taped statements he gave to police at the scene of the crime were admitted into evidence in violation of the corpus delicti rule. We disagree.

The corpus delicti of a crime must be established by evidence independent of an accused's inculpatory statements. *People v McMahan*, 451 Mich 543, 548-549; 548 NW2d 199 (1996). However, the rule is limited to admissions which are confessions, and not to admissions of fact which do not amount to confessions of guilt. *People v Porter*, 269 Mich 284, 289-291; 257 NW 705 (1934); *People v Rockwell*, 188 Mich App 405, 407; 470 NW2d 673 (1991). After carefully reviewing the record, we find that defendant's statements to police were admissions of fact which did not, by themselves, show guilt of any crime and which were therefore properly admitted.

Defendant also argues that the statements were inadmissible because they were taken in violation of his *Miranda*[1] rights. This argument is equally without merit.

Because the statements were admissions of fact, no voluntariness analysis is required. *People v Wytcherly*, 172 Mich App 213, 219; 431 NW2d 463 (1988). Further, defendant was neither in custody when he made the statements, nor were they the result of police interrogation; therefore, the

requirements of *Miranda* were not triggered. See *People v Hill*, 429 Mich 382, 384; 415 NW2d 193 (1987); *People v Anderson*, 209 Mich App 527, 532; 531 NW2d 780 (1995). Because there was no *Miranda* violation, we also reject defendant's claim that the statement he subsequently gave at the police station should have been excluded as the fruit of the poisonous tree, i.e., as resulting from the statement illegally taken at the scene.

Defendant next argues that the district court erred by binding him over on an open charge of murder. We disagree.

At the preliminary examination, the parties stipulated that the victim died from a gunshot wound to the head and that the gun admitted into evidence was the one used in the shooting. Defendant told police that the gun "just went off" while still in the holster. However, a firearm expert testified that the gun had not been fired while in the holster and that it would not go off accidentally. Therefore, there was a question of fact for the jury regarding defendant's intent at the time of shooting, and defendant was properly bound over on an open charge of murder. *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989).

Defendant also claims that the trial court abused its discretion by allowing similar acts testimony by the victim's daughter. We disagree.

The testimony showed that defendant had previously become violent when discussing his romantic relationship with the victim; it was therefore relevant to show motive and absence of accident. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993). The probative value of the evidence was not outweighed by its potential for unfair prejudice, especially where there was no less prejudicial manner by which to admit the substance of the testimony. *Id* at 74-75; see also *People v Cadle*, 204 Mich App 646, 655-656; 516 NW2d 520, remanded on other grounds 447 Mich 1009 (1994). Accordingly, admitting it was not an abuse of discretion.

Defendant next claims that he was denied a fair trial by the prosecutor's failure to turn over potentially exculpatory statements made by a witness. We again disagree.

A defendant has a due process right to obtain evidence in the possession of the prosecutor if it is favorable to the accused, and material to guilt or punishment. *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963); *People v Carter*, 415 Mich 558, 593; 330 NW2d 314 (1982). However, there was no *Brady* violation here because defendant possessed the same information as the witness. *United States v Mullins*, 22 F3d 1365, 1371 (CA 6, 1994). Further, the testimony was introduced at trial, not withheld from defendant, and therefore there was no due process violation. *United States v Agurs*, 427 US 97, 103; 96 S Ct 2392; 49 L Ed 2d 342 (1976).

Defendant also alleges that he was deprived of a fair trial by the prosecutor's misconduct. We have thoroughly examined these unpreserved instances of alleged misconduct and find that manifest injustice will not result if we decline to review them. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant also claims that the trial court erred by admitting expert testimony regarding the position of the victim at the time she was shot. We disagree.

The trial court did not abuse its discretion in finding that the expert was qualified to render such an opinion. *People v Peebles*, 216 Mich App 661, 667-668; 550 NW2d 589 (1996). Defendant's arguments, even those made in his supplemental brief, go to the weight and not the admissibility of the testimony.

Defendant next argues that the trial court erred in refusing to instruct the jury on the cognate lesser offense of statutory manslaughter (CJI2d 16.11), and in refusing to give a specific intent instruction. We again disagree.

We note that the court did instruct the jury on the cognate lesser offense of common law manslaughter (CJI2d 16.10). However, because defendant denied having intentionally pointed the gun at the victim, the statutory manslaughter instruction (CJI2d 16.11) was unsupported by the evidence. *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991). Defendant's request for a specific intent instruction was properly refused because second degree murder is a general intent crime. See *People v Langworthy*, 416 Mich 630, 650-652; 331 NW2d 171 (1982). Having reviewed the jury instructions as a whole, we find that the instructions given fairly presented the issues to be tried and sufficiently protected defendant's rights. *People v Davis*, 216 Mich App 47, 54-55; 549 NW2d 1 (1996).

Next, defendant argues that there was insufficient evidence to support his second-degree murder conviction, that the conviction was against the great weight of the evidence, and that the conviction resulted in a miscarriage of justice. We are not persuaded by defendant's arguments.

As noted by the trial court, although defendant claimed that the shooting was accidental, there was testimony that the victim was in a "ducking" position when shot, that the gun could not accidentally discharge, and that the defendant had been assaultive in the past when discussing marriage with the victim. Viewed in the light most favorable to the prosecution, this evidence is sufficient for a rational trier of fact to find every element of the crime proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985). The jury clearly chose to not believe defendant's account of how the shooting occurred -- an issue that was properly left to the fact finder. *People v Herbert*, 444 Mich 466, 474; 511 NW2d 654 (1993). Further, having carefully reviewed the record, we also agree that the verdict was not against the great weight of the evidence. *Id* at 475. There was no miscarriage of justice in this case.

Finally, defendant claims resentencing is required because the trial court failed to fully articulate its reasons for the sentence imposed and because the sentence violates the principle of proportionality. These arguments are without merit.

When imposing sentence, the trial court noted defendant's background, his lack of a criminal record, his tumultuous relationship with the victim, and the heinous nature of the crime. The trial court, therefore, sufficiently articulated its reasons for the sentence imposed. *People v Coles*, 417 Mich 523,

549-550; 339 NW2d 440 (1983), overruled in part on other grounds *People v Milbourn*, 435 Mich 630, 635; 461 NW2d 1 (1990). Further, because defendant's seventeen year minimum sentence is within the recommended range of the sentencing guidelines, it is presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); see also *People v Milbourn*, 435 Mich 630, 656; 461 NW2d 1 (1990). Defendant has failed to rebut that presumption. *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992).

Affirmed.

/s/ Janet T. Neff
/s/ Myron H. Wahls
/s/ Clifford W. Taylor

[1] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694 (1966).